83 - 630

No.

Office-Supreme Court, U.S.
FILED
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

14 October 1983

Attorneys for Petitioner

QUESTION PRESENTED*

May a state constitutionally deny all resident aliens the opportunity to become notaries public, while under *In re Griffiths*, 413 U.S. 717 (1973), qualified resident aliens cannot be denied admission to the bar or be denied the right to administer oaths and perform other functions similar to those carried out by notaries public?

*In addition to the parties identified in the caption, Margarita M. Vargas was a plaintiff-appellee in the proceedings below.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

REFERENCE TO OPINIONS 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

THE DECISION BELOW CONFLICTS WITH THE RELEVANT OPINIONS OF THIS COURT AND WITH THE DECISIONS OF EVERY OTHER COURT WHICH HAS CONSIDERED THE ISSUE 4

CONCLUSION 8

APPENDIX 1a

Amended Stipulation of Fact 1a

District Court Memorandum and Order 5a

District Court Judgment 14a

Court of Appeals Opinion 15a

Court of Appeals Judgment 27a

TABLE OF AUTHORITIES

Cases: Page

Ambach v. Norwick,
441 U.S. 68 (1979) 6
Cabell v. Chavez-Salido,
454 U.S. 432 (1982) 4-6
Cheng v. Illinois,
438 F. Supp. 917 (N.D. Ill. 1977) 7
Examining Board of Engineers v. Flores de Otero,
426 U.S. 572 (1976) 6
Foley v. Connelie,
435 U.S. 291 (1978) 6
In re Griffiths,
413 U.S. 717 (1973) 4-7
Graham v. Ramani,
383 So. 2d 634 (Fla. 1980) 7
Nyquist v. Mauclet,
432 U.S. 1 (1977) 6
Sugarman v. Dougall,
413 U.S. 634 (1973) 6
Taggart v. Mandel,
391 F. Supp. 732 (D. Md. 1975)
(three-judge court) 7
Vargas v. Strake,
710 F.2d 190 (5th Cir. 1983) 2

United States Constitution:

Amendment XIV, § 1 ..... *passim*

Federal Statutes:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343(3) and (4) 2

Page

State Statutes:

Conn. Gen. Stat. Rev. § 51-85 5
Del. Code § 29-4301(b) 7
Ga. Official Code Ann. § 71-101 7
Idaho Code § 34-402 7
Idaho Code § 51-101 7
Mo. Rev. Stat. § 486.010 7
Mont. Code Ann. § 1-5-402 7
N.H. Rev. Stat. Ann. ch. 455, § 1 7
N.H. Rev. Stat. Ann. ch. 654, § 1 7
N.M. Stat. Ann. § 1-1-4 7
N.M. Stat. Ann. § 14-12-2 7
McKinney's Consol. Laws of N.Y.,
Executive Law § 130 7
N.D. Century Code § 16.1-01-04 7
N.D. Century Code § 44-06-01 7
Okla. Stat. § 49.1 7
Purdon's Penna. Stats. Ann. Title 25, § 2811 7
Purdon's Penna. Stats. Ann. Title 57, § 149 7
R.I. Gen. Laws §42-30-5 7
S.C. Code of Laws § 7-5-120 7
S.C. Code of Laws § 26-1-10 7
Tex. Rev. Civ. Stat. Ann. § 5949(2) ..... *passim*
Tex. Rev. Civ. Stat. Ann. § 5954 5
Utah Code Ann. § 20-1-17 7
Utah Code Ann. § 46-1-1 7
Code of Va. § 47.1-4 7
Wash. Rev. Code § 42.28.010 7
Wyo. Stat. § 32-1-101 7

State Constitutions:

N.M. Const. art. VIII-1 (as amended) 7

Page

N.D. Const. art. II, § 1 7
R.I. Const. art. 38, § 1 7
Wash. Const. art. VI, § 1,
as amended by amendment 5 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OPINIONS

The opinion of the United States District Court for the Southern District of Texas, Brownsville Division, dated 9 October 1981, which declared unconstitutional the Texas statute at issue in this case and which contains that Court's findings of fact and conclusions of law, is reproduced in the Appendix ("App.") at pages 5a-13a. The opinion is not reported.

The opinion of the United States Court of Appeals for the Fifth Circuit, in which a divided panel of that Court reversed the district court and upheld the constitutionality of the statute, is reported at 710 F.2d 190 (1983) under the name *Vargas v. Strake* (App. 15a-28a).

JURISDICTION

The judgment of the court of appeals was entered on 25 July 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> . . . No State shall make or enforce any law which shall. . . deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes Annotated article 5949(2) (1982) states in pertinent part:

> To be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this State and at least eighteen (18) years of age. . . .

STATEMENT OF THE CASE

This case was originally filed by Margarita M. Vargas, who was then a citizen of the Republic of Mexico, to challenge the constitutionality of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires a person to be a citizen of the United States in order to be eligible for appointment as a notary public in Texas. Jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343(3) and (4).

When the complaint was filed, Vargas was a lawful resident alien in this country. She worked as a secretary/receptionist in a real estate office in Brownsville and wished to become a notary public so that she could administer oaths and take sworn statements from clients of her office. While the litigation was pending, she became a United States citizen and is thus eligible to become a notary public. This case is therefore moot as to her. App. 3a.

Petitioner Efrem Bernal was added as a party plaintiff in district court. He is a lawful resident alien who has been living in the United States for approximately 20 years and was educated in this country. From 1974 to 1978, he was employed in a migrant legal services program in Indiana, during which time he was a notary public in that state. Since 1978 he has been employed as a paralegal for Texas Rural Legal Aid, Inc. in Hidalgo County. Petitioner stated in his deposition, filed with the district court, that he works exclusively with migrant farm workers on employment and civil rights issues and takes statements from them in the field. If commissioned as a notary public, he would be able to notarize these statements in the field, rather than having to bring along someone else to administer oaths.

Respondent John W. Fainter, Jr. is Secretary of State of the State of Texas and is automatically substituted for his predecessor, George W. Strake, Jr., pursuant to Rule 40.3 of the Rules of this Court. Respondents Joe Rivera and Santos Saldana are the county clerks for Cameron and Hidalgo Counties, respectively. At the time this suit was brought, the Texas notary public statute required applicants for a commission to submit a standardized application form to the local county clerk, who then forwarded it to the Secretary of State for consideration. Since then, the statute has been amended to make the Secretary of State solely responsible for processing such applications.

In 1978, petitioner applied to become a notary public in Texas, but his application was denied. He appealed that decision and was given an administrative hearing, but the denial was upheld on the sole ground that he was ineligible for appointment as a notary public because of the citizenship requirement in Tex. Rev. Civ. Stat. Ann. art. 5949(2).

In district court, the case was submitted on the basis of stipulated facts (reproduced in the Appendix at pages la-4a). The court declared Tex. Rev. Civ. Stat. Ann. art. 5949(2) to be unconstitutional as a denial of the equal protection of the laws and enjoined the respondents from refusing to consider the applications of Vargas and Bernal to become notaries public.

The court of appeals reversed, with two judges (Reavley and Politz, JJ.) holding that the statute did not violate equal protection guarantees, on the ground that the exclusion of resident aliens bore a rational relationship to a legitimate state purpose under this Court's opinion in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Judge Ingraham dissented. He argued that the majority had misread *Cabell* and that this case is controlled by *In re Griffiths*, 413 U.S. 717 (1973), which invalidated a ban on the admission of aliens to the Connecticut bar. He further noted that "the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public." App. 25a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE RELEVANT OPINIONS OF THIS COURT AND WITH THE DECISIONS OF EVERY OTHER COURT WHICH HAS CONSIDERED THE ISSUE.

1. The petition should be granted because the court of appeals failed to follow this Court's decision in *In re Griffiths*,

supra, which dealt with admission of resident aliens to a state bar. The court of appeals not only failed to analyze *Griffiths*, but it relegated the case to a footnote, App. at 19a n.3, even though *Griffiths* was re-affirmed last year in *Cabell v. Chavez-Salido, supra*, 454 U.S. at 439-40.

In *Griffiths*, this Court invalidated on equal protection grounds a Connecticut court rule denying bar admission to resident aliens. This citizenship requirement also barred resident aliens from serving as Commissioners of the Superior Court, an office to which all Connecticut lawyers are appointed. In this latter capacity, they may "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds." Conn. Gen. Stat. Rev. § 51-85. This Court found that the citizenship restriction could not withstand strict scrutiny because the functions of lawyers and Commissioners of the Superior Court "hardly involve matters of state policy or acts of such major responsibility as to entrust them only to citizens." 413 U.S. at 724.

The Connecticut statute at issue in *Griffiths* encompassed all the powers granted to Texas notaries public, who shall "have the same authority to take acknowledgments or proof of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions as is now or may hereafter be conferred by law upon County Clerks ...." Tex. Rev. Civ. Stat. Ann. art. 5954. There is thus an irreconcilable conflict between *Griffiths* and the court of appeals' decision.

Even though Texas may not preclude all resident aliens from becoming notaries public, it is not powerless to regulate their qualifications. As this Court recognized in *Griffiths*, "the possibility that some resident aliens are unsuited to the practice of law [cannot] be a justification for a wholesale ban." 413 U.S. at 725. A state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant" and to "require

appropriate training and familiarity" with state laws. *Id.* These principles apply with equal force to the licensing of notaries public. There is no showing in the record that serving as a notary public in Texas is so complex or important a function that it should be entrusted only to citizens.

On the same day that this Court decided *Griffiths*, it also invalidated a wholesale ban on aliens serving in a state's competitive civil service. *Sugarman v. Dougall*, 413 U.S. 634 (1973). Since then, the Court has applied strict scrutiny analysis to invalidate state statutes which denied resident aliens the right to be licensed as a civil engineer, *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976), and to receive financial assistance for higher education. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In *Sugarman*, this Court carved out an exception to the rule of strict scrutiny, indicating that it would not be utilized when the classification applies to "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." *Sugarman v. Dougall, supra*, 413 U.S. at 647. As refined in subsequent cases, the *Sugarman* exception requires a state to show that (1) a challenged classification is not "substantially over or underinclusive," and (2) even if the classification is "sufficiently tailored," it is limited to "state elective or important non-elective" positions. *Cabell v. Chavez-Salido, supra*, 454 U.S. at 440. As thus refined, the *Sugarman* exception has been applied to uphold classifications which barred aliens from serving as police officers, *Foley v. Connelie*, 435 U.S. 291 (1978), public school teachers, *Ambach v. Norwick*, 441 U.S. 68 (1979), and peace officers, *Cabell v. Chavez-Salido, supra*.

The court of appeals examined the Texas restriction under the *Sugarman* exception, even though, unlike *Foley*, *Ambach*,

and *Cabell*, notaries are not government employees. Indeed, as this Court indicated in *Griffiths*, Commissioners of the Superior Court do not hold the sort of "important" office which would warrant application of this exception, 413 U.S. at 724. If the court of appeals decision is allowed to stand, and administering oaths is thus regarded as a vital state function, not only will there be a conflict with *Griffiths*, but it is hard to imagine what kind of minimal state function would not qualify as "important," such that classifications involving resident aliens would be examined under the *Sugarman* exception.

2. The writ should also be granted because the court of appeals' decision contradicts every other lower court opinion which has addressed this issue. Virtually identical statutes have been invalidated in recent years by the Florida Supreme Court, *Graham v. Ramani*, 383 So. 2d 634 (1980), and by federal district courts in Maryland and Illinois. *Taggart v. Mandel*, 391 F. Supp. 732 (D. Md. 1975)(three-judge court); *Cheng v. Illinois*, 438 F. Supp. 917 (N.D. Ill. 1977). The court of appeals majority did not even cite these decisions, let alone explain why it believed they are incorrect. In this regard, it should be noted that the court of appeals' decision, if allowed to stand, will have an impact beyond Texas. Seventeen other states have statutes which require United States citizenship as a condition for being licensed as a notary public.[1] Thus, this

[1] Some of these statutes are similar to the Texas law in that they explicitly state that only citizens of the United States can qualify as notaries public. *See* Del. Code § 29-4301(b); Ga. Official Code Ann. § 71-101; Mo. Rev. Stat. § 486.010; Mont. Code Ann. § 1-5-402; McKinney's Consol. Laws of N.Y., Executive Law § 130; Okla. Stat. § 49.1; Code of Va. § 47.1-4; Wyo. Stat. § 32-1-101. Other statutes require notaries public to have the same qualifications as voters and require voters to be United States citizens. *See* Idaho Code § 51-101 and § 34-402; N.H. Rev. Stat. Ann. ch. 455, § 1 and ch. 654, § 1; N.M. Stat. Ann. § 14-12-2 and §1-1-4; *cf.* N.M. Const. art. VII-1 (as amended); N.D. Century Code § 44-06-01 and § 16.1-01-04; *cf.* N.D. Const. art. II, § 1; Purdon's Penna. Stats. Ann. Title 57, § 149 and Title 25, § 2811; R.I. Gen. Laws § 42-30-5 and R.I. Const. art. 38, § 1; S.C. Code of Laws § 26-1-10 and § 7-5-120; Utah Code Ann. § 46-1-1 and § 20-1-17; Wash. Rev. Code § 42.28.010 and Wash. Const. art. VI, § 1, as amended by amendment 5.

conflict in lower court decisions and the likelihood of further litigation over similar statutes in other states provide additional reasons for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

Attorneys for Petitioner

14 October 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, et al.	)	
	)	C.A. No. B-79-147
VS.	)	
	)	
GEORGE W. STRAKE, JR., et al.	)	

AMENDED STIPULATION OF FACT

NOW COME, MARGARITA M. VARGAS and EFREM BERNAL, Plaintiffs, and George W. Strake, Jr., Joe Rivera, and Santos Saldana, Defendants, and stipulate:

1. At all times relevant hereto, the Secretary of State prescribed the form entitled, "Application for Appointment as Texas Notary Public," a true copy of which is attached hereto as Exhibit A, to the 254 County Clerks of the State of Texas, including Defendants Rivera and Saldana.

2. At all times relevant hereto, the 254 County Clerks of the State of Texas, including Defendants Rivera and Saldana, uniformly required an applicant for appointment as a Texas notary public to complete the application, i.e., Exhibit A, and the County Clerk returned the completed applications to Defendant Strake for consideration as more fully set forth at Tex.Rev.Civ.Stat. art. 5949(3) (1971).

3. The policy of the Secretary of State is as follows: When the application for appointment as a notary public indicates

that the applicant is not a United States Citizen that applicant is not appointed; such an application is held pending further communication with the applicant; and if the applicant communicates that he or she is also applying for United States Citizenship, no further action is taken on the application until a determination is made by the Immigration and Naturalization Service on the grant or denial of citizenship. If the applicant advises that he or she is not applying for United States citizenship, the Secretary of State's Office will set an adminstrative hearing.

4. Plaintiff Efrem Bernal is a resident alien of the United States and is properly registered with the United States Immigration and Naturalization Service. He has not applied for United States citizenship.

5. Plaintiff Bernal is 31 years of age, having been born at Valle Hermosa, Tamaulipas, Mexico, on June 18, 1950.

6. Plaintiff Bernal is a resident of Hidalgo County, Texas. He now resides at 1212 East Lucas, Pharr, Texas.

7. After his arrival in the United States Plaintiff Bernal attended the public schools of the Pharr-San Juan-Alamo Independent School District in Hidalgo County, Texas and graduated from Pharr-San Juan-Alamo High School.

8. At the present time Plaintiff Bernal is employed by Texas Rural Legal Aid, Inc. as a paralegal assistant. He has been employed in that capacity for three years.

9. Plaintiff Bernal was previously employed at AMOS, Inc., a migrant legal services program, in the City of Plymouth, Marshall County, Indiana. He served as a notary public for Marshall County, Indiana from 1974-1978.

10. Plaintiff Bernal applied to become a notary public in the State of Texas on October 4, 1978, a true copy of his application being attached hereto as Exhibit B.

11. On October 12, 1978, Plaintiff Bernal's application to be a notary public was not granted by Defendant Strake and Plaintiff Bernal appealed the decision. The complete file of the proceedings, including the final decision and order of Defendant Strake, is attached hereto as Exhibit C.

12. Plaintiff Margarita M. Vargas was a resident alien of the United States and was properly registered with the United States Immigration and Naturalization Service. She obtained United States citizenship in 1981.

13. Plaintiff Vargas is 29 years of age, having been born at Cerritos, San Luis Potosi, Mexico, on December 30, 1951.

14. Plaintiff Vargas has been a resident of Brownsville, Cameron County, Texas since 1974. She now resides at 1746 East Southmost, Brownsville, Texas.

15. After her arrival in the United States Plaintiff Vargas attended the public schools of Santa Paula, California, graduating from high school at Santa Paula, California, and she attended Moorpark College at Moorpark, California, and was awarded the degree of Associate of Arts.

16. Plaintiff Vargas was employed by Baldauf-Echols Company, realtors, as a secretary/receptionist. Prior to that, she was a legal secretary.

17. Plaintiff Vargas applied to become a notary public on June 27, 1979, a true copy of her application being attached hereto as Exhibit D.

18. On July 10, 1979, Plaintiff Vargas' application to be a notary public was neither granted nor rejected but retained by Defendant pursuant to memorandum, a true copy of which is attached hereto as Exhibit E.

19. Plaintiffs desire to become notary publics in order to authenticate signatures to deeds, affidavits, and other legal

documents in the course of their employment.

20. Texas has an extensive border with Mexico.

APPROVED:

Thomas Sullivan
P.O. Box 71
Brownsville, Texas 78520

ATTORNEY FOR
PLAINTIFFS

Martha H. Allan
Assistant Attorney General
of Texas
Supreme Court Building
Austin, Texas 78711
ATTORNEY FOR
DEFENDANT GEORGE W.
STRAKE, JR.

Roy Dale
Assistant District Attorney
Cameron County
974 E. Harrison Street
Brownsville, Texas 78520

ATTORNEY FOR
DEFENDANT JOE RIVERA

Juan Partida
Assistant District Attorney
Hidalgo County
100 N. Closner
Edinburg, Texas 78539

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, ET AL	)	C.A. No. B-79-147
VS.	)	
	)	FILED
GEORGE W. STRAKE, JR.	)	OCT 9, 1981
		JESSE E. CLARK, CLERK

MEMORANDUM AND ORDER

INTRODUCTION

This action is brought by Margarita M. Vargas and Efrem Bernal seeking to have this Court declare unconstitutional and enjoin the enforcement of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires one to be a citizen of the United States in order to be eligible for appointment as a notary public.

The lawsuit, originally filed by Ms. Vargas as a class action on behalf of similarly situated legal resident aliens interested in being appointed to the office of notary public, is brought by way of 28 U.S.C. § 2201 and 2203, and 42 U.S.C. § 1983. The suit was subsequently amended to add plaintiff Bernal, upon the filing by Ms. Vargas of her application for United States citizenship. A further amendment eliminated the class action allegation, and the case is now tried before the Court as an individual action by plaintiffs Vargas and Bernal.

The defendants are George W. Strake, Jr., Secretary of State of the State of Texas, Joe Rivera, County Clerk of Cameron County, Texas, and Santos Saldana, County Clerk of Hidalgo County, Texas.

JURISDICTION

Jurisdiction is conferred on the Court by 28 U.S.C. § 1343(3) and (4), which provides for original jurisdiction in civil actions to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

The court has carefully considered the extensive briefs of the parties and the evidence presented, and concludes that the case is properly before the court for determination, that the particular requirement of Article 5949 is violative of minimum constitutional standards and that appropriate declaratory and injunctive relief is necessary.

FINDINGS OF FACT

This case is presented to the court upon stipulated facts.

Margarita M. Vargas was born at Cerritos, San Luis Potosi, Mexico, on December 30, 1951. After her arrival in the United States she attended public schools at Santa Paula, California, and attended Moorpark College at Moorpark, California, and was awarded the degree of Associate of Arts. Ms. Vargas was employed by Baldauf-Echols Company, realtors, as a secretary-receptionist. Prior to that, she worked as a legal secretary. Ms. Vargas has been a resident of Brownsville, Cameron County, Texas, since December of 1974.

Ms. Vargas applied to become a notary public on June 27, 1979. At that time she was a resident alien of the United States, and was properly registered with the United States Immigration and Naturalization Service. On July 10, 1979, her application for appointment was neither granted nor rejected, but rather was retained by defendant Strake pursuant to memorandum. Ms. Vargas obtained United States citizenship in 1981, subsequent to the filing of this lawsuit.

Plaintiff Efrem Bernal was born on June 18, 1950, at Valle Hermoso, Tamaulipas, Mexico. He is presently a resident of Pharr, Hidalgo County, Texas, and is also a resident alien, properly registered with the Immigration and Naturalization Service. Mr. Bernal attended the public schools of the Pharr-San Juan-Alamo School District. Mr. Bernal is presently employed by Texas Rural Legal Aid, Inc., as a paralegal assistant, and has been employed in that capacity for three years. He was previously employed by AMOS, Inc., a migrant legal services program, in the city of Plymouth, Indiana. He served as a notary public for Marshall County, Indiana, from 1974 to 1978.

Plaintiff Bernal applied to become a notary public in Texas on October 4, 1978. Defendant Strake did not grant his application, and Bernal appealed the decision, obtaining an administrative hearing. His requested relief was not granted at that hearing.

The Secretary of State prescribed the form entitled "Application for Appointment as Texas Notary Public", to the 254 County Clerks of the State of Texas, including defendants Rivera and Saldana. The County Clerks, including defendants Rivera and Saldana, uniformly required an applicant to complete the application, the Clerk then returning the completed application to defendant Strake for consideration.

The Secretary of State has a set policy regarding these applications. When the application for appointment as a notary public indicates that the applicant is not a United States citizen, that applicant is not then appointed; his application is instead held pending further communication with the applicant. If the applicant communicates that he or she is also applying for United States citizenship, no further action is taken until a determination is made by the Immigration and Naturalization Service on the grant or denial of citizenship. If the applicant advises that he or she is not applying for citizenship, the Secretary of State's Office will set an administrative hearing on the matter.

CONTENTIONS

The issues before the court for decisions are these:

1. Has the case become moot as to plaintiff Margarita M. Vargas.

2. Have plaintiffs failed to exhaust their administrative remedies.

3. Is the statute in question unconstitutional as a denial of equal protection.

4. Is the Eleventh Amendment a bar to the relief prayed for by plaintiffs.

CONCLUSIONS OF LAW

MOOTNESS

Defendants initially claim that plaintiff Vargas' case has become moot due to the fact that she has now gained United States citizenship, and only need re-apply in order to be appointed as a notary public. A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormick*, 395 U.S. 486 (1968). A case, however, may be moot as to some issues, and yet still live as to others. *Id.* at 497; *Florida Board of Business Regulation v. National Labor Relations Board*, 605 F.2d 916, 918 (5th Cir. 1979). In the case at hand, although the issue of denial of equal protection has been rendered moot by the grant of citizenship upon Ms. Vargas, she has alleged and maintains a viable claim for damages for the period in which she was unconstitutionally discriminated against due to her alienage. The fact that she is now a citizen and thus eligible for appointment as a notary public under the statute as it stands would not automatically void her right to recover any damages she may have suffered in the past. *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants strongly argue that plaintiffs' claims are prematurely before this court in that plaintiffs have failed to exhaust their administrative remedies of appealing into the state court system. One of the exceptions to the traditional rule that state administrative remedies must first be exhausted before applying to the federal courts, however, is when the claimant is seeking to have a statute declared unconstitutional and administrative action will leave the constitutional question standing. *Public Utilities Commission v. United States*, 355 U.S. 534 (1958); *Patsy v. Florida International University*, 634 F.2d 900, 903 (5th Cir. 1981). Furthermore, state judicial remedies need not be exhausted as a prerequisite to the filing of an action under 42 U.S.C. § 1983. *Monroe v. Pope*, 365 U.S. 167 (1961).

Defendants argue that this exception should not apply in this instance since administrative interpretation of the statute might relieve its constitutional infirmity. Assuming that this is a valid argument, the court thinks it inconceivable that the phrase "resident citizen of the United States" could be interpreted to include non-citizens.

CONSTITUTIONALITY OF THE STATUTE

In order to determine the constitutionality of Article 5949, we must first decide the standard by which the statute must be judged. It is well settled that aliens come within the protective bounds of the Equal Protection Clause of the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Traux v. Raich*, 239 U.S. 33, 39 (1915); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Generally, classifications based on alienage have been strictly scrutinized, with the states' power to treat aliens differently than citizens being confined within narrow limits. *Graham v. Richardson*, 403 U.S. 365, 372 (1970). As stated by the Supreme Court in *Graham v. Richardson, supra*;

> "[C]lassification based on alienage, like those based on nationality or race, are inherently suspect

> and subject to close judicial scrutiny. Aliens as class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) for whom such heightened judicial solicitude is appropriate." *Id.*, at 372. (Footnotes omitted.)

This rationale was explained by the Supreme Court in *In Re Griffiths*, 413 U.S. 717, 722 (1973), wherein Connecticut's citizenship requirement for admission to that state's bar was struck down. The court stated simply:

> "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Services, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities."

However, non-citizens have never been clothed with the full spectrum of rights and privileges available to citizens, and rightfully so. The Constitution allows the states to differentiate between citizens and non-citizens where "important nonelective executive, legislative and judicial positions" are involved, whose officers "participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1972). In cases involving these positions, the state need only show a "rational relationship between the interest sought to be protected and the limiting classification." *Foley v. Connelie*, 435 U.S. 291, 296 (1978), *Ambach v. Norwick*, 441 U.S. 68, 74 (1979).

Turning our attention to the specific office of notary public in Texas, the duties thereof are set out in Tex. Rev. Civ. Stat. Ann. art. 5954, and include the authority "to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths and take depositions. . . ." Although these functions are certainly important, the court does not find that the impor-

tance of the office of notary public falls "within the classification of important non-elective officers who participate directly in the execution and review of broad public policy functions" as defendants argue. Therefore, the classification drawn in this case must be strictly scrutinized, and upheld only if it serves a compelling state interest.

In light of the strict scrutiny required by the Constitution in eyeing this classification based on alienage, the court is unable to find the compelling state interest that is necessary to constitutionality. Indeed, this court would find it difficult to uphold the citizenship requirement under the less stringent rational-basis test. The functions performed by notaries public, while aiding in the smooth operaton of a multitude of day-to-day affairs, are for the most part ministerial, lacking the close relationship with governmental policymaking and discretionary concerns spoken of in *Sugarman v. Dougall, supra*. The citizenship requirement in this case is wholly unrelated to the achievement of any valid state interest.

Arguments that the office of notary public may be abused by non-citizens are simiarly unpersuasive. As stated by the court in response to similar arguments to maintain the citizenship requirement as to notaries public in Maryland, "there is no evidence before this Court, nor would it accept any, that aliens as a class are inherently any less trustworthy than citizens." *Taggart v. Mandel*, 391 F. Supp. 733, 739 (D. Md. 1975). Furthermore, the bond requirement and provisons for removal for misconduct are adequate protections against abuses.

It should be noted here that this court does not reach or pass upon the statute's requirement of legal residence for eligibility, but only the question of citizenship as it is applied to legal, documented aliens.

ELEVENTH AMENDMENT BAR

Defendants further contend that the Eleventh Amendment bars both monetary damages and injunctive relief in this case.

The court does not reach the issue concerning damages as we find as a matter of fact that the evidence does not sustain an award of money damages.

The right to grant appropriate prospective injunctive and declaratory relief cannot seriously be challenged. The right of the federal courts to grant this type of relief from unconstitutional action was firmly established in *Ex parte Young*, 209 U.S. 123 (1907), and has been followed consistently. *See, e.g., Graham v. Richardson*, 430 U.S. 365 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The case of *Alabama v. Pugh*, 438 U.S. 781 (1978), cited by defendants, does not preclude injunctive relief in this case. Instead, that case holds that a federal court is precluded from granting such relief against a state. The State of Texas is not a party to this lawsuit.

The court further finds that is is authorized to award plaintiffs attorney's fees in this case. 42 U.S.C. § 1988; *Guajardo v. Estelle*, 580 F.2d 748, 763 (5th Cir. 1978).

CONCLUSION

Any finding of Fact which constitutes a Conclusion of Law shall be deemed such. Any conclusion of Law which constitutes a Finding of Fact shall be deemed such. For the reasons set forth above, this court is of the opinion that the declaratory and injunctive relief prayed for by plaintiffs should be and is hereby GRANTED, and it is hereby;

DECLARED that the citizenship requirement imposed by Tex. Rev. Civ. Stat. Ann. art. 5949(2) is unconstitutional as a denial of the equal protection of the laws to resident aliens; and it is

ORDERED that Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, are hereby permanently enjoined from refusing to consider Plaintiffs for appointment as notaries public in Texas on grounds that they are not citizens of the United States; and it is

ORDERED that Defendants pay Plaintiffs their costs and reasonable attorneys' fees in connection with this lawsuit, the amount of such attorneys' fees to be established by affidavits to be submitted, or upon a hearing on the matter if the parties do not reach an agreement as to a reasonable amount.

Done at Brownsville, Texas, on this the 9th day of October, 1981.

/s/ Filemon B. Vela

FILEMON B. VELA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, et al.	)	
	)	C.A. No. B-79-147
VS.	)	
	)	FILED
GEORGE W. STRAKE, JR.	)	NOV 4, 1981
	)	JESSE E.
	)	CLARK, CLERK

JUDGMENT

Be It Remembered:

That on the 9th day of October, 1981, came on to be signed and filed the Memorandum and Order of the Court in this cause. The aforesaid Order constitutes the final judgment therein for all purposes.

It is so ORDERED, ADJUDGED and DECREED.

Done at Brownsville, Texas, this 4th day of November, 1981.

/s/ Filemon B. Vela

FILEMON B. VELA
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Margarita M. VARGAS and Efrem BERNAL, etc., Plaintiffs-Appellees,	)	
	)	
v.	)	**No. 81-2457**
	)	
George W. STRAKE, Jr., etc., et al., Defendants-Appellants.	)	

July 25, 1983.

Appeals from the United States District Court for the Southern District of Texas.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

REAVLEY, Circuit Judge:

This case is an appeal from a district court judgment declaring unconstitutional Tex.Rev.Civ.Stat.Ann. art. 5949(2) (Supp. 1982), which requires a person to be a United States citizen in order to be eligible for appointment as a notary public in the State of Texas. We reverse.

Factual and Procedural Background

This action challenging the constitutionality of art. 5949(2) was originally brought by Margarita M. Vargas who, at the time of filing, was a citizen of the Republic of Mexico but a resident alien of the United States, lawfully registered with the Immigration and Naturalization Service and living in Texas. Vargas completed much of her education in this country, including college; she has been employed as a legal

secretary and is presently the secretary/receptionist for a real estate firm in Brownsville. After she began the suit, she obtained United States citizenship.

A second party, Efrem Bernal, was later added as an individual plaintiff. Bernal has at all times been and still is a citizen of the Republic of Mexico, but he, too, has been a lawful resident alien in this country for some years now. Bernal has been employed for several years as a paralegal assistant by Texas Rural Legal Aid, Inc. Prior to that, he was employed by AMOS, Inc. a migrant legal services program in Plymouth, Indiana. From 1974 to 1978 Bernal served as a notary public for Marshall County, Indiana.

The defendants/appellees in this action are the Texas Secretary of State and the county clerks of Cameron and Hidalgo counties. The county clerks uniformly require all applicants for the position of notary public to complete a standardized application form, which is then forwarded to the Secretary of State for consideration.

In 1979 Vargas applied to become a notary public in Texas; at that time she was still a citizen of Mexico but lawfully residing within Texas. Pursuant to established procedures, her application was received by the Texas Secretary of State. The record reveals that whenever that office receives applications from noncitizens, it either sets an administrative hearing or, if the applicant is also applying for citizenship, holds the application in abeyance pending final action of federal authorities on the application for citizenship. In Vargas' case the latter route was followed.

In 1978 Bernal had also applied to become a notary public in Texas. The Secretary of State denied his application. Bernal appealed that decision, obtaining a state administrative hearing, but the result of the hearing was that the Secretary's decision was upheld.

In the present action, Vargas and Bernal sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202

that art. 5949(2) was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment, insofar as it denied a lawful resident alien the opportunity to attain appointment as a notary public in Texas. No contention was made that the Texas law was an economic disadvantage to the plaintiffs. Both Vargas and Bernal admitted that neither were threatened with loss of employment or pay because they were not notaries.

Applying a strict scrutiny standard, the court held that the statute was unconstitutional as violative of the equal protection clause. The court further held that the citizenship requirement could not be upheld even under the less stringent rational relationship test. It therefore granted declaratory relief and permanently enjoined the defendants from refusing to consider Vargas and Bernal for appointment as notaries public in Texas on the ground of their citizenship status.

The defendants have brought the present appeal, raising four issues: (1) whether the action is moot as to Vargas, because she is now a United States citizen (and because only the declaratory judgment/injunctive relief portion of the district court's order is in issue); (2) whether the court erred in holding that plaintiff Bernal was not required to exhaust administrative remedies (by appealing the denial of his application by the administrative tribunal into the Texas state court system); (3) whether the district court applied an incorrect legal standard in judging the constitutionality of the statute in question (and the connected issue of the constitutionality of the statute under the appropriate standard); and (4) whether Vargas and Bernal were entitled to an award of costs and attorneys' fees.

Although the issues herein appear to have become moot as to Vargas (because she can reapply for a commission as a notary public having now attained citizenship), they are clearly not moot as to Bernal (nor do the defendants argue that they are). Moreover, Bernal was clearly not required to appeal into the state court system the denial of his application

by the administrative tribunal as a prerequisite to challenging the constitutionality of the statute in federal court. *See Public Utilities Commission v. United States*, 355 U.S. 534, 539-40, 78 S.Ct. 446, 450-51, 2 L.Ed. 2d 470 (1958). We turn to the heart of this controversy — the constitutionality of art. 5949(2).

Constitutionality of the Citizenship Requirement in art. 5949(2)

Noting that classifications based on alienage have generally been subjected to close judicial scrutiny,[1] the district court applied a "strict scrutiny" standard in judging the constitutionality of art. 5949(2) and struck down the statute because it could find no compelling state interest to uphold it. The court alternatively held that even if the constitutionality of the statute were considered under the less stringent "rational relationship" test,[2] it was unconstitutional because the "functions performed by notaries public, while aiding in the smooth operation of a multitude of day-to-day affairs, are for the most part ministerial, lacking the close relationship with governmental policymaking and discretionary concerns.... [t]he citizenship requirement in this case is wholly unrelated to the achievement of any valid state interest."

---

[1] *See Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971)(recognizing that classifications based on alienage are "inherently suspect" and holding unconstitutional as violative of equal protection clause state statutes denying welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years).

[2] *See Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed. 2d 49 (1979)(holding that public schoolteachers come within "governmental function" principle such that federal constitution requires only that a citizenship requirement applicable to teaching in public schools bears a rational relationship to a legitimate state interest); *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed. 2d 287 (1978)(applying a rational-basis standard and holding that state could exclude aliens from becoming state troopers).

The latest word from the Supreme Court addressing the sensitive topic of state classifications dealing with aliens may be found in *Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982). The district court did not have the benefit of the Court's analysis in *Cabell*, as that decision was handed down by the Supreme Court subsequent to the decision here. With the advantage of the *Cabell* decision we conclude that the constitutionality of art. 5949(2) must be judged under a rational relationship test and, further, that when so judged, the constitutionality of the statue must be upheld.

In *Cabell* the Court attempted to summarize the precise contours of its previous holdings in the area of state classifications affecting aliens. In that case resident aliens were refused employment by a California county as deputy probation officers. They filed suit in federal court seeking a judgment declaring unconstitutional a California statute which required a person to be a United States citizen in order to be a peace officer or to occupy any state, county or local governmental position declared by state law to possess powers of a peace officer. A three-judge district court panel declared the California statute unconstitutional, but the Court, by a five to four vote, reversed.

Writing the majority opinion, Justice White recognized that under the Court's holdings in *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973) and other cases, "citizenship is not a relevant ground for the distribution of economic benefits, [but] it is a relevant ground for determining membership in the political community." 454 U.S. at 438, 102 S.Ct. at 739. State restrictions that affect lawfully resident aliens primarily in an economic fashion will be subject to heightened or strict judicial scrutiny. *Id.*[3] Con-

[3] *See Examining Board v. Flores de Otero*, 426 U.S. 572, 604, 96 S.Ct. 2264, 2282, 49 L.Ed. 2d 65 (1976)(Court struck down Puerto Rican law that would have denied license as a civil engineer to resident alien, noting that the right to work for a living in the common occupations of the community "'is of the very essence of

versely, strict scrutiny will not be applied when the restriction serves primarily a political function:

> "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Sugarman v. Dougall, supra,* 413 U.S. at 648, 93 S.Ct. at 2850. We have thus "not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self government." *Ambach v. Norwick*, 441 U.S. 68, 73-74, 99 S.Ct. 1589, 1593, 60 L.Ed. 2d 49 (1979). And in those areas the state's exclusion of aliens need not "clear the high hurdle of 'strict scrutiny' because that would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship.'" *Foley v. Connelie*, 435 U.S. 291, 295, 98 S.Ct. 1067, 1070, 55 L.Ed. 2d 287 (1978)(citations omitted).

Id. (footnote omitted).

The *Cabell* Court also explained that the *Sugarman* decision should be regarded as establishing a two-step process for determining whether a particular state restriction on legally resident aliens serves political versus economic goals:

> First, the specificity of the classification will be examined: a classification that is substantially over or

---

the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'"); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973)(Court struck down Connecticut law restricting admission to the bar to United States citizens as violative of equal protection rights of resident aliens).

> underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. The classification in *Sugarman* itself — all members of the competitive civil service — could not support the claim that it was an element in "the State's broad power to define its political community," 413 U.S. at 643, 93 S.Ct. at 2848, because it indiscriminately swept in menial occupations, while leaving out some of the state's most important political functions. Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, operation, or review of broad public policy" and hence "perform functions that go to the heart of representative government." *Id.*, at 647, 93 S.Ct. at 2850. We must therefore inquire whether the "position in question... involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Foley v. Connelie, supra*, 435 U.S. at 296, 98 S.Ct. at 1070.

454 U.S. at 440, 102 S.Ct. at 740 (footnote omitted). Thus, our inquiry in the present case should be whether the citizenship restriction imposed by Texas on the position of notary public serves political or economic goals, applying the two-step process described above.

Art. 5949(2) appears to satisfy the first step of the process because it is sufficiently specific — it is neither substantially over or underinclusive. The language of the statute provides that "[t]o be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States...." The restriction imposed by that language applies *solely* to persons seeking appointment as a notary public, and has no effect on or application to persons seeking appointment to any

other state office or position. Thus, if anything, the Texas statute is much more precisely drafted[4] or "sufficiently tailored" than the California statute in *Cabell* — which defined the term "peace officer" to include over 70 different state jobs, ranging from dental board inspectors to park rangers to harbor police to welfare fraud investigators. Despite the seemingly overinclusiveness of the California statute (because of its effect on so many different kinds of state jobs), the *Cabell* Court found that the citizenship restriction there did not reach so far and so broad "as to belie the state's claim that it is only attempting to ensure that an important function of government be in the hands of those having the 'fundamental legal bond of citizenship.'" 454 U.S. at 442, 102 S.Ct. at 741.

The second step presents this question: Does a notary public in Texas exercise discretion in making decisions which substantially affect members of the political community? Whatever may be thought about the prestige of the office, the importance of the consequences of the official acts of the notary public to the government and courts of the state cannot be denied. The revised civil statutes of Texas contain many references to their deeds and duties. Art. 5954 grants this authority:

> Notaries Public shall have the same authority to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks. . . .

In the stated areas, they possess authority identical to county clerks. With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out-of-court

[4] The Court explained in *Cabell* that a state classification need not be "precise," but is sufficiently tailored to withstand a facial challenge to its constitutionality if it is merely a "substantial fit." 454 U.S. at 442, 102 S.Ct. at 741.

depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day-to-day functioning of state government. The Texas political community depends upon the notary public to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and accurately administered. Land titles and property succession depend upon the care and integrity of the notary public, as well as the familiarity of the notary with the community, to verify the authenticity of the execution of documents.

Notaries certify to acknowledgements (art. 6602) of conveyances which admit the instruments to public record (art. 6626), and which record may in turn be the only evidence of authenticity if the original document is unavailable. (arts. 3726, 3726a). Wills signed and attested by the testator and two witnesses, if identified and sworn by a notary public, may be admitted to probate without any supporting proof. (Probate Code §§ 59, 84). The acknowledgements of notaries are admissible evidence of the facts recited therein. (arts. 3723, 6602). There are numerous instances where affidavits are required to insure accuracy and gravity of declarations, all depending in some measure upon the notary public who administers the oath; for example, suits on sworn account, judicially admissible business records and medical x-rays (art. 3737e) and recorded affidavits of heirship (art. 3726a). The courts of Texas give evidence and weight to the certificate of a notary public. "To impeach a notary's certificate, it has been held that the evidence must be clearly cogent and convincing beyond any reasonable controversy. *Griffin v. Stewart*, 348 S.W.2d 800 ([Tex.] Civ. App. [1961] n.w.h.)." *Hall v. Hayes*, 441 S.W.2d 275, 277 (Tex. Civ. App. — El Paso 1969, no writ).

We conclude that the office of a notary public in Texas is not a mere job or source of income, and that it is comparable

to the positions of school teacher and police and probation officers in importance to the functioning of state government. The notary public may symbolize the power of the political community when administering a solemn oath or demanding certain proof of identity for the execution of a formal document. The citizenship restriction in art. 5949(2) bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state. Because Texas has a valid interest and right to define for itself the qualifications for the position of notary public, and because a citizenship requirement does not impermissibly violate equal protection guarantees in these circumstances, we uphold the constitutionality of art. 5949(2).

REVERSED.

INGRAHAM, Circuit Judge, concurring in part and dissenting in part:

I concur with much of the majority opinion, but I must respectfully dissent from its holding that Tex. Rev. Civ. Stat. Ann. art. 5949(2) is constitutional. I agree that the issues appear to have become moot with respect to Vargas and that they remain alive with respect to Bernal. Further, I agree that Bernal was not required to exhaust administrative remedies. I disagree, however, with the majority's conclusion that the district court erred in applying the strict scrutiny standard to determine the constitutionality of the statute. Therefore, with deference, I must respectfully dissent in part.

The responsibilities and duties of a notary public in Texas are more akin to the authority granted Connecticut lawyers, *see In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973), than the plenary powers given peace officers, *see Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982), state troopers, *see Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed. 2d 287 (1978), or school teachers. *See Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589,

60 L.Ed. 2d 49 (1979). As the Supreme Court noted, "a [Connecticut] lawyer has authority to 'sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgments of deeds.'" *In re Griffiths*, 413 U.S. at 723, 92 S.Ct. at 2855 (quoting Conn. Gen. Stat. Rev. § 51-85). Thus, the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public. *See supra* at 5972. The Supreme Court, however, has stated that "[i]t in no way denigrates a lawyer's high responsibilities to observe that [these duties] hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Id.* at 724, 93 S.Ct. at 2856. Because the Supreme Court has held that states cannot require citizenship of lawyers, a profession whose responsibilities and duties comprehend more than those of the Texas notary public, I would apply the analysis of *In re Griffiths* to hold art. 5949(2) unconstitutional.

Despite the clear language in *Griffiths* declaring that the functions of notaries public are not of the character that justifies excluding noncitizens, the majority attempts to distinguish the present case as representing a political function and therefore subject to a less demanding standard of review. This lower standard is permissible when the classification applies to a political office only because of "the recognition of the fact that a democratic society is ruled by its people . . . [and the requirements that a political officer be a citizen] represents the choice, and right, of the people to be governed by their citizen peers." *Foley*, 435 U.S. at 296, 98 S.Ct. at 1071. The issue then becomes whether notaries public are governing officers. The Supreme Court clarified this inquiry in *Cabell* by stating that the classification could be applied only "'to persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, operaton, or review of broad public policy' and hence 'perform functions that go to the heart of representative govern-

ment.'" *Cabell*, 454 U.S. at 440, 102 S.Ct. at 740 (quoting from *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973). The Supreme Court goes on to state that "[w]e must therefore inquire whether the 'position in question . . . involves discretionary decisionmaking or execution of policy, which substantially affects members of the political community.'" *Id.* 454 U.S. at 441, 102 S.Ct. at 740 (quoting *Foley*, 435 U.S. at 296, 98 S.Ct. at 1070).

The majority, however, restates this inquiry as "Does a notary public in Texas exercise discretion in making decisions which substantially affect members of the political community?" *Supra* at 5972. This reformation focuses on whether notaries exercise any discretion in making the decisions associated with their duties rather than whether their duties involve discretionary decisionmaking or execution of policy, which would reveal a governing role. Accordingly, the majority emphasizes the importance of notaries in the proper and orderly handling of legal documents and their role in the smooth functioning of the state government. Nevertheless, this shifted focus illustrates the clerical nature of the duties of notaries public.

Moreover, when we examine the duties of Texas notaries to determine whether they involve discretionary decisionmaking or execution of policy, we find that notaries perform purely ministerial functions. Unlike the peace officers in *Cabell* or the state troopers in *Foley*, notaries public do not "partake of the sovereign's power to exercise coercive force over the individual." *Cabell*, 454 U.S. at 445, 102 S.Ct. at 743. Neither do notaries exercise the wide discretion enjoyed by teachers in presenting course materials that "inculcat[e] [the] fundamental values necessary to the maintenance of a democratic political system." *Ambach*, 441 U.S. at 77, 99 S.Ct. at 1594. Instead, the responsibility of the notary public is "to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and

accurately administered." *Supra* at 5973. While the accurate and consciencious performance of these duties are important for the smooth functioning of the state government, they do not "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Griffiths*, 413 U.S. at 724, 93 S.Ct. at 2856.

Accordingly, I would affirm the district court decision holding Tex. Rev. Civ. Stat. art. 5949(2) unconstitutional.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2457

D.C. Docket No. B-79-147

MARGARITA M. VARGAS and
EFREM BERNAL, Etc.,

Plaintiffs-Appellees,

versus

GEORGE W. STRAKE, JR.,
Etc., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeals to be taxed by the Clerk of this Court.

July 25, 1983

INGRAHAM, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate: AUG 16 1983.